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IN THE

Supreme Court of the United States

October Term, 1955

No. 885

BERNARD P. CALHOUN,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, and HONORABLE JOHN A. HEWICKER, JUDGE OF SAID COURT,

Appellees.

Appeal From the Supreme Court of California.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, and HONORABLE JOHN A. HEWICKER, JUDGE OF SAID COURT,

Appellees.

Appeal From the Supreme Court of California.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

Statement.

Appellees have moved to dismiss the appeal herein on two grounds, viz.: (a) that the case was not docketed within the time required by law; and (b) that the appeal does not present a substantial federal question.

I.

The Appeal Is Timely.

The following chronology of the steps taken on the appeal in this case will show that the appeal is timely, wit:

(a) The Supreme Court of California entered judgment denying the peremptory writ of prohibition

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and discharging the alternative writ of prohibition on December 30, 1955;

(b) Said Court denied petition for a rehearing on January 25, 1956;

(c) Appellant filed notice of appeal in said State Court on January 27, 1956;

(d) Appellant filed amended notice of appeal in said Court on February 8, 1956;

(e) Appellant filed record on appeal in the office of the Clerk of the Supreme Court of the United States on March 22, 1956; and

(f) Appellant filed jurisdictional statement in the office of said Clerk on April 20, 1956.

Appellees failed to correctly state the date of the filing of the record on appeal, saying in this behalf [Motion to Dismiss, p. 4]:

> "The Statement as to Jurisdiction was filed and the Record was docketed in this Court on April 20, 1956, more than 60 days after the filing of the notice of appeal and/or the Amended Notice of Appeal."

The true chronology above set forth shows that the record on appeal was filed less than 55 days after the first notice of appeal, and 43 days after the amended notice of appeal.

It is true that the jurisdictional statement was filed more than 60 days after amended notice of appeal was filed. Appellant's counsel assumed that such delayed filing was proper in view of the letter of the Clerk acknowledg-

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ing receipt of the record on March 22, 1956, reading as follows:

> "Receipt is acknowledged of your letter of the 19th instant and enclosures. I assume that in due course you will send me 40 printed copies of the statement as to jurisdiction, with proof of service."

If, for any reason, appellant has not complied fully with Rules 13 and 15 of the Revised Rules of this Court in respect to the filing of the record on appeal and jurisdictional statement, the appellant respectfully requests that the Court treat this as a motion for extension of time for such filing until and including April 21, 1956, and that an order *nunc pro tunc* be entered thereon accordingly.

II.

The Case Presents Substantial Federal Questions.

A. Section 182, Subdivision 5, of the California Penal Code Is so Vague and Indefinite That It Fails Adequately to Define the Offense or to Prescribe Reasonable Standards for Determining Guilt, Hence Violates the Fourteenth Amendment.

The case of *Musser v. Utah,* 333 U. S. 95, followed by *Musser v. Utah,* 118 Utah 537, 223 P. 2d 193, is squarely in point. The Utah statute (Sec. 103-11-1, U. C. A. 1943) is identical with the California statute here involved (Pen. Code, sec. 182, subd. 5). The California statute provides that it shall be unlawful

> "If two or more persons conspire: * * *
>
> 5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws."

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In the *Musser* case this Court returned the case to the Supreme Court of Utah, so that the Utah Court might have the opportunity of passing upon the constitutionality of the Utah statute. That court said (223 P. 2d 193 at p. 194):

> "Our problem here is to determine whether the broad sweep of that general language, in view of the whole context of that statute and our other statutory and common laws and the history and background of the enactment of that statute may be by construction limited so as to define the offense therein denounced so as 'to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused' under the subdivision. Musser v. State, 333 U. S. 95 * * * (*Id.* p. 193.) * * *
>
> "The conviction of the defendants thereunder cannot be upheld. This part of the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution." (*Id.* p. 194.)

It is true that the defendants in the *Utah* case were charged with the offense of conspiring "(5) to commit an act injurious * * * to public morals" only; but this fact is immaterial. If the statute was void for vagueness and uncertainty in defining "any act injurious * * * to public morals," it would be equally vague and uncertain as to the offense of conspiring to commit an act "to pervert or obstruct justice, or the due administration of the laws."

The vice of such statutes lies in the fact that "they do not provide some reasonable standards of guilt" and that

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they are insufficient "to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are charged." (333 U. S. 95, 97.) See, also:

United States v. Cohen Grocery Co., 225 U. S. 81, 89-93;

Winters v. New York, 333 U. S. 507, 519-520;

Herndon v. Lowry, 301 U. S. 242, 259;

United States v. Cardiff, 344 U. S. 174.

B. The Indictment Herein in so Far as it Charges Conspiracy "to Pervert or Obstruct Justice, or the Due Administration of the Laws" (Penal Code, Sec. 182, Subd. 5) is so Vague and Indefinite That it Fails to Advise Defendant-Appellant of the Nature of the Offense Attempted to Be Charged Against Him, or to Guide the Court in the Trial Thereof.

It is well-settled that the phrase "obstructing justice" relates, generally, to the impeding or obstructing of a *court* proceeding. See:

Romans v. State, 178 Md. 588, 16 A. 2d 642, 644;

Shackelford v. Kentucky, 185 Ky. 51, 214 S. W. 788;

People v. Tenerowicz, 266 Mich. 276, 253 N. W. 296;

Melton v. Commonwealth, 160 Ky. 642, 170 S. W. 37, 42;

Ex parte McLeod, 120 Fed. 130, 139-140;

Toledo etc. Co. v. United States, 247 U. S. 402;

United States v. Carroll, 147 Fed. 947, 953.

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The indictment in this connection does not mention or refer to a court proceeding, nor does it allege that any court proceeding was perverted or obstructed by appellant, or by any other defendant.

The overt acts charged in Counts TWO and THREE of the indictment do not mention or refer to any court proceeding; nor do said Counts mention or refer to appellant. The overt acts are alleged to have been committed by named persons other than appellant. It thus appears that appellant is not advised: (a) that he is clearly charged with committing any unlawful act; or (b), if charged with an unlawful act, he is not advised of the nature thereof.

The vice of vagueness and uncertainty in the challenged statute (Pen. Code, sec. 182, subd. 5) is thus aggravated and increased by the vagueness and uncertainty of the indictment itself. It is obvious that if appellant should be forced to trial on Counts TWO and THREE of the indictment, he will not be advised of the nature of the offense attempted to be charged, nor will he be able to properly prepare his defense thereto. He is thus doubly deprived of the protection guaranteed by the Fourteenth Amendment.

The phrase "to pervert or obstruct * * * the due administration of the laws" is likewise so vague and uncertain, especially when considered in connection with the overt acts charged in Counts TWO and THREE of the indictment, that appellant is not advised of the nature of the offense of obstructing administration of the law attempted to be charged against him in said Counts. He cannot intelligently plead or prepare his defense thereto, and is thereby deprived of rights guaranteed by the Fourteenth Amendment. "Administration of the laws" is the

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equivalent of "administration of justice," and as to the latter this Court and other federal courts have held that not even perjury constitutes an obstruction to the administration of justice.

In re Michael, 326 U. S. 224;

United States ex rel. Johnston v. Goldstein, 158 F. 2d 916, 921;

O'Malley v. United States, 128 F. 2d 676;

Ex parte Hudgings, 249 U. S. 382, 385.

C. The Sufficiency of the Indictment to State an Offense May Be Attacked Here.

Appellees contend that appellant is foreclosed from attacking the sufficiency of the indictment. [Motion to Dismiss, p. 12.] This is incorrect. On March 25, 1955, in the Superior Court of San Diego County, appellant demurred to the indictment herein on the ground that each and all of the Counts thereof fail to state a public offense, in that such Counts are too indefinite and uncertain (Jurisdictional Statement, p. 6), which demurrer was overruled.

The vice of a prosecution for violation of a conspiracy statute, such as section 182, subdivision 5, of the California Penal Code, was clearly stated by Mr. Justice Jackson in *Krulewitch v. United States,* 336 U. S. 440, as follows:

> "As a practical matter, the accused is often confronted by a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejud-

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> icial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. * * *
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

In the case at bar the conspiracy statute is so vague and indefinite that it offends the Fourteenth Amendment. The indictment suffers a like infirmity. Obviously, appellant cannot intelligently plead thereto. A prosecution under such conditions would deny to appellant the safeguards of and the rights guaranteed by the Constitution.

It is immaterial that a bare majority of the California Supreme Court, in *Lorenson v. Superior Court,* 35 Cal. 2d 49, held section 182, subdivision 5, of the Penal Code to be valid. Three of the seven Justices dissented. This Court is not bound by the decision of the State Supreme Court when it appears that the State Court decision involving the validity of a statute under the Federal Constitution is contrary to the decisions of this Court. This Court's denial of certiorari in *People v. Sullivan,* 113 Cal. App. 2d 510 (345 U. S. 955), cannot be construed as sustaining the constitutional validity of section 182, subdivision 5 of the California Penal Code.

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D. Section 5002.5 of the California Elections Code Is Unconstitutional in That It Is Based Upon an Arbitrary Classification and Is Not of Uniform Operation.

> Section 5002.5 of the Elections Code applies only to "any elective State officer who is authorized by law to issue licenses, or who is a member of any board or agency authorized to issue licenses, or any person seeking election to such office, board or agency * * *." etc. (For full text, see Jurisdictional Statement, p. 3.)

Actually, section 5002.5 of the Elections Code is directed at only one of all the elective officers of the State of California, namely, a member of the State Board of Equalization. Any violation of the statute is made a misdemeanor.

The narrow operation of the statute and its extremely restricted classification are more apparent when it is noted that all elective officers of the State except members of the Board of Equalization may solicit and receive campaign funds from licensees of said Board; that members of the Board may themselves solicit from any one other than its licensees, including applicants for licenses; that any employee, appointee, or member of any other State Board may solicit and receive from licensees of the State Board of Equalization campaign funds for a candidate or candidates for elective office; and that there is no other elective State Board which issues licenses. We submit that the classification restricting the statute's application to only one type of elective State officer and the inhibition against the solicitation or receipt of money from a licensee are based upon whimsical or fanciful reasons, and are therefore in violation of the Fourteenth Amendment.

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It is a general rule that classification shall not be arbitrary, but must be based upon some real difference in the classes having a substantial relation to a legitimate object to be accomplished.

Takahaski v. Fish & Game Com'n, 334 U. S. 410;

Mansur v. City of Sacramento, 39 Cal. App. 2d 426, 430, and cases cited.

This rule is violated by section 5002.5 of the Elections Code, and said section is in violation of the Fourteenth Amendment.

III.

The Questions Presented Are Ripe for Decision.

Appellees' contention that the questions presented on this appeal are not ripe for decision is unsound and contrary to the decisions of this Court.

The general rule as to the requirements for a justiciable case or controversy is stated in *Alabama State Federation of Labor v. McAdory,* 325 U. S. 450 at page 461, as follows:

> "This Court is without power to give advisory opinions. (Citing cases.) It has long been its considered practice not to decide abstract, hypothetical or contingent questions (citing cases), or to decide any constitutional question in advance of the necessity for its decision (citing cases), or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied (citing cases), or to decide any constitutional question except with reference to the particular facts to which it is to be applied. (Citing cases.)"

The questions presented on this appeal are not abstract, or hypothetical, or contingent upon any facts not charged

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in the indictment. Moreover, there is present necessity for deciding the constitutional questions which were presented in the trial court and in the California Supreme Court. Appellant has exhausted every available legal procedure possible in or required by the State courts or by State law. If the challenged statutes are unconstitutional, appellant should not be subjected to a long, expensive and embarrassing trial. Every material fact necessary to a decision of the constitutional validity of the statutes is in the record, and, indeed, in the indictment itself. The questions presented on this appeal are, indeed, ripe for decision.

Respectfully submitted,

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